

**IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

**QBE SPECIALTY INSURANCE
COMPANY, et al.,**

Plaintiffs,

v.

**THE ENCLAVE AT OAK HILL
OWNERS ASSOCIATION, INC.,**

Defendant.

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CIVIL ACTION NO. 1:23-CV-100-JB-B

MOTION TO COMPEL COMPLIANCE WITH NON-PARTY SUBPOENA

Plaintiffs QBE Specialty Insurance Company, Indian Harbor Insurance Company, Crum and Forster Specialty Insurance Company, IAT CCM Ltd., and Everest Corporate Member Ltd. and Third-Party Defendant Certain Underwriters at Lloyd's, London Subscribing to Policy Number 01-7590104296-S-03 (collectively, the “**Insurers**”), pursuant to Fed. R. Civ. P. 45(g), move the Court for an order compelling production of documents requested in the Insurers’ non-party subpoena to ATA Loss Consulting, LLC (“**ATA**”). The Insurers show as follows:

1. On September 7, 2023, the Insurers issued a non-party subpoena to ATA. (Ex. A Doc. 37-1, PageID.1620-24).
2. ATA was served via certified mail with the subpoena on September 14, 2023. (Ex. B Doc. 37-2, PageID.1625-26).
3. ATA’s response to the subpoena was due September 25, 2023. (Ex. A).
4. ATA has failed to respond or produce any documents requested in the subpoena to date. ATA only sent an email link to a \$5,203.00 invoice on September 25, 2023 at 4:47 PM

on the date the production was due, from an email address that does not accept replies.¹ (Ex. C. Doc. 37-3, PageID.1627-28).

5. The Insurers have scheduled an onsite inspection at the Insured's property next week with a team of multiple experts traveling and need ATA's subpoena production to provide to the experts and for review in advance of the Insurers' upcoming expert disclosure deadline in this case. Given the time-sensitive nature of this matter, undersigned counsel contacted ATA via multiple email addresses on September 27, 2023 in efforts to confer and avoid this motion but has not received any response to that email or to the subpoena as of this filing. (Ex. D. Doc. 37-4, PageID.1629-30).

6. No party has served or filed any timely (or untimely) objections or motions to quash the subpoena. Therefore, any objections have been waived. *See Ala. Educ. Ass'n v. Bentley*, Civil Action No. CV-11-S-761-NE (N.D. Ala. Jan. 7, 2013).

WHEREFORE, the premises considered, the Insurers respectfully requests that the Court enter an order compelling ATA to produce all documents requested in the Insurers' non-party subpoena.²

¹ These charges appear excessive for electronic production of this file, and undersigned counsel has concerns on the price per page and likely inclusion and charges for multiple duplicate documents, but no documents have been produced to date for evaluation of these issues.

² Because this motion concerns a non-party subpoena under Rule 45 rather than discovery under Rules 26-36, and because the motion is filed under Rule 45(g) rather than Rule 37, it is not subject to the requirement under Rule 37(a)(1) and the Court's scheduling order (*see* Doc. 27, PageID.1577) that counsel personally confer with the opposing party's counsel before filing a motion to compel. *See Davis v. Speechworks Int'l, Inc.*, 2005 WL 1206894, *5 (W.D.N.Y. May 20, 2015) ("Rule 37...does not apply to a motion to compel compliance with a subpoena pursuant to Fed. R. Civ. P. 45."); *see also Jalayer v. Stigliano*, 2016 WL 5477600, *3 (E.D.N.Y. Sept. 29, 2016) (following *Davis* and citing other cases to the same effect). Notwithstanding, undersigned counsel has conferred with opposing counsel on the issue to advise this motion was

s/ Matthew H. Hambrick

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CERTIFICATE OF SERVICE

I hereby certify that I have on this 28th Day of September 2023, served a copy of the foregoing by filing same through the CM/ECF system, which will automatically send electronic notice and a copy of the foregoing to the following:

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